

Before the
Federal Communications Commission

Washington, D.C. 20554

MM Docket No. 96-117

RECEIVED

AUG 15 1996

FCC MAIL ROOM

In re Application of)

WPVG, INC.)

For Renewal of License for)
Station WPVG(AM), Funkstown, MD)

File No. BR-950601VH

DOCKET FILE COPY ORIGINAL

To: Administrative Law Judge Arthur I. Steinberg

MOTION FOR SUMMARY DECISION

WPVG, Inc., by its counsel, pursuant to Sec. 1.251 of the Commission's Rules, respectfully moves the issuance of a summary decision in this proceeding, granting the license renewal application for Station WPVG(AM), Funkstown, Maryland. In support whereof, WPVG states as follows:

Introductory

1. This proceeding was designated for evidentiary hearing by Hearing Designation Order by the Audio Services Division, Mass Media Bureau, adopted May 16, 1996, released May 22, 1996 (DA 96-814).¹ The issues specified for hearing were as follows:

- (1) To determine whether WPVG, Inc. has the capability and intent to expeditiously resume broadcast operations of WPVG(AM), consistent with the Commission's Rules.

¹ 61 Fed. Reg. 27873, June 3, 1996.

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- (2) To determine whether WPVG, Inc. has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules.²
- (3) To determine, in light of the evidence adduced pursuant to the preceding issues, whether grant of the subject renewal of license application would serve the public interest, convenience and necessity.

2. The Hearing Designation Order stated (para. 2) the factual basis for designation and specification of the foregoing issues as follows:

WPVG suspended operations on October 30, 1994 when the owner of the station's transmitting antenna site ordered the licensee to remove its facilities from the property. * * * In its June 1, 1995 renewal application WPVG reported that its search for a new site was complicated by the necessity to secure a site that would serve both WPVG's needs while protecting AM Stations WMET (Gaithersburg, Maryland) and WCCS (Homer, Pennsylvania) from interference. On September 12, 1995, WPVG reported that it was negotiating for two possible sites, that it hoped to finalize an agreement for one of these sites by September 24, 1995, and that it expected to file the proper application (FCC Form 301) for this site when the site owner accepted its offer. The special temporary authority approving WPVG's September, 1995 request [to remain silent] expired March 27, 1996.

The Hearing Designation Order continued as follows (Ibid):

A review of the record for this station does not indicate that an application to relocate the station's transmitting antenna has been filed. Further, the licensee has neither notified the Commission that

² §73.1740(a) provides, insofar as here pertinent, that if a broadcast station will be silent (off-the-air) for longer than thirty (30) days, informal request shall be made to the Commission for additional time to be silent.

§73.1750 provides that, in the event of the permanent discontinuance of operation of a broadcast station, the licensee shall (1) notify the Commission thereof at least two (2) days prior to such discontinuance and (2) forward the station license and other authorizations for the station to the Commission for cancellation.

broadcast operations have resumed nor requested further extension of its special temporary authority. Therefore, WPVG is in apparent violation of Sections 73.1740 and 73.1750 (footnotes omitted) of the Commission's Rules.

Findings of Fact

3. The facts stated in the Hearing Designation Order (para. 2, supra) respecting the loss by WPVG, Inc., of the transmitter site for WPVG are undisputed. Further facts are as follows:

(a) On April 18, 1996, WPVG, Inc., had filed an application (under Form 301) for construction permit for a new transmitter site. The cover letter to that application (Attachment A) stated, among other things, that "Station WPVG is presently off the air and will be until the station is built after the CP is granted". Public notice of the receipt and acceptance of the application for the new site was issued by the Commission on May 13, 1996.³

(b) On May 30, 1996, eight days after release of the Hearing Designation Order, WPVG, Inc., by letter of its counsel, requested an extension of the temporary authority for WPVG to be silent. The request stated as grounds for the extension requested that WPVG was silent by reason of the eviction from its transmitter site and that it necessarily must be silent until its pending application for a new site (para. (a), supra) is granted.

(c) Also on May 30, 1996, WPVG, Inc., filed the environmental statement for its new transmitter site as directed by paragraph 5 of the Hearing Designation Order.⁴

(d) By letter of its counsel dated June 6, 1996, submitted pursuant to the Public Notice released May 22, 1996 (DA 96-818), Procedures Announced for Expedited Processing of Applications Filed by Silent Broadcast Stations, WPVG, Inc., requested expedited processing of its application (para. (a), supra) for a new transmitter site for WPVG.

³ Public Notice, Broadcast Applications, Report No. 23736, May 13, 1996, page 6.

⁴ The statement was a copy of the statement previously filed in WPVG, Inc.'s application for its new transmitter site (para. (a), supra).

(e) By letter dated June 27, 1996, from the Audio Services Division, Mass Media Bureau, WPVG, Inc., was advised of technical deficiencies in its application for its new transmitter site (Attachment B). The letter afforded thirty (30) days from the date thereof for submission of a curative amendment.

(f) WPVG, Inc.'s curative amendment (see para. (e), supra) was filed with the Commission on July 24, 1996.

(g) By fax message dated July 30, 1996, from the Joe Szczesny, Audio Services Division, Mass Media Bureau (Attachment C), WPVG, Inc., was advised as follows:

Ready to grant WPVG app as soon as FAA approval received. Fax FAA approval to me as soon as you receive it.

4. Pursuant to Commission Order, the license for Station WPVG will expire by operation of law if WPVG has not returned to on-the-air broadcast operation by February 8, 1997.⁵

Conclusions

5. The actual facts undermine the basis for the Hearing Designation Order and, in effect, render the issues designated moot. The Hearing Designation Order was based on two assumptions of fact, to wit, that WPVG, Inc., (1) had filed no application for a new transmitter site and (2) had not requested an extension of its authority to be silent beyond March 27, 1996, both of which were in error. It is clear that Issue No. (1), to determine whether WPVG, Inc., has the "capability and intent" to restore WPVG to operation, derived by inference directly from these erroneous assumptions of fact. In fact, WPVG, Inc.'s application for a new transmitter site was filed on April 18,

⁵ Commission's Order adopted May 14, 1996, released May 17, 1996, FCC 96-218, applying 47 U.S.C. §312(g), adopted in the Telecommunications Act of 1996, enacted February 8, 1996.

1996, more than a month before issuance of the Hearing Designation Order, and public notice of the acceptance of the application was issued by the Commission on May 13, 1996, prior to adoption of the Hearing Designation Order.⁶

6. The cover letter submitting the foregoing application on April 18, 1996, stated, among other things, the following:

Station WPVG is presently off the air and will be until the station is built after the CP is granted.

While the quoted statement does not expressly request extension of the temporary authority for WPVG to be silent, it clearly states that more time will be needed to restore WPVG to operation and could have only one meaning if WPVG was to be restored to service, to wit, that an extension of the temporary authority for WPVG to be silent was necessary. These facts (as stated here and in the preceding paragraph) rebut the assumed facts on which the Hearing Designation Order was based and dispel any inference that WPVG, Inc., had either an inability or lack of intention to restore WPVG to operation. It is appears clear that had the true facts been recognized before the Hearing Designation Order was issued, it would not have been issued.

7. The actions of WPVG, Inc., since designation of its license renewal application for hearing (1) specifically requesting an extension of the temporary authority for WPVG to

⁶ Fn. 3, supra. It is a matter of official notice that, pursuant to Commission operating procedures, the public notice of acceptance of the application means that the filing and acceptance of the application were information available in the Commission's computer data bank prior to adoption of the Hearing Designation Order on May 16, 1996.

be silent until it can return to operation at its new site (para. 3(b), supra) and (2) to diligently prosecute and expedite the processing of its application for its new site to the point where, insofar as the Commission is concerned, it is ready for grant (paras. 3(c) through (g), supra) indicate the intention and capability of WPVG, Inc., to restore WPVG to operation promptly.

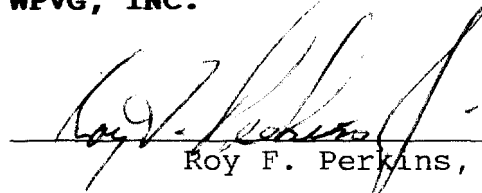
8. Respecting Issue (2), WPVG, Inc., clearly has had the intention to restore WPVG to operation. This is demonstrated by the fact that it located a new site for WPVG, prepared the requisite application for that site and filed it on April 18, 1996, and has diligently prosecuted it since that time (paras. 3(a) through (g), supra). Thus, WPVG, Inc., has not been and is not in violation of Sec. 74.1750 of the Rules (failure to return a license upon permanent discontinuance of operation). As to Sec. 73.1740(a)(4) of the Rules, WPVG, Inc., did timely request additional time to remain silent, which was granted through March 27, 1996 (para. 2, supra). The violation alleged, thus, is a failure to request a further extension of that authority. While there was a failure to do so in the period from March 27, 1996, until WPVG, Inc.'s application for a new site was filed on April 18, 1996, with notification to the Commission at that time that WPVG necessarily must continue silent until the application is granted and the station reconstructed (paras. 3(a) and 6, supra), it is clear that the fact of failure to request a further extension of the temporary authority was alleged as evidence of abandonment of the intention to reconstruct the

station and restore it to operation, not as an independent ground for denial of license renewal.

9. Accordingly, it is concluded pursuant to Issue No. (3) that grant of the instant application for renewal of license of Station WPVG, Funkstown, Maryland, would serve the public interest, convenience and necessity and, pursuant thereto, that the said application will be granted.⁷

Respectfully submitted,

WPVG, INC.



Roy F. Perkins, Jr.

1724 Whitewood Lane
Herndon, Virginia 20170
(703) 435-9700
Its Attorney

August 14, 1996

⁷ Paragraph 4 of the Hearing Designation Order, as adopted on May 16, 1996, directs that grant of the instant application be conditioned on a precise period for resumption of operation. That provision has been overtaken by the Commission's Order, adopted May 14, 1996, released May 17, 1996, applying the new Sec. 312(g) of the Communications Act, adopted in the Telecommunications Act of 1996, enacted February 8, 1996. The aforesaid Order provides, pursuant to the new Sec. 312(g) of the Act, that, for stations such as WPVG which were off-the-air prior to February 8, 1996, their licenses will expire by operation of law if they have not returned to broadcast operation by February 8, 1997. Thus, by law grant of the license renewal application for WPVG is conditioned on its returning to broadcast operation by February 8, 1997 (giving WPVG, Inc., only about 5 months to secure grant of the construction permit for the new WPVG transmitter site, construct the station facilities at that site and restore WPVG to broadcast operation) and, in the event of its failure to do so, the license for WPVG will automatically expire. No further condition on the license renewal for WPVG is necessary.

Attachment A

PETER V. GURECKIS & ASSOCIATES

BROADCAST ENGINEERING CONSULTANTS

10410 WINDSOR VIEW DR., POTOMAC, MARYLAND 20854

(301) 299-5383

PETER V. GURECKIS (MEMBER AFCCE)

TELECOPIER NUMBER (301) 299-5604

April 16, 1996

DUPLICATE

Mr. William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street N.W.
Washington, D. C. 20554

Re: Radio Station WPVG
Funkstown, Maryland

Dear Sir:

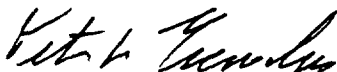
Enclosed are three copies of a minor change application for Radio Station WPVG, Funkstown, Maryland to change antenna sites.

Also, enclosed is a check in the amount of \$650.00 for the filing fee.

Station WPVG is presently off the air and will be until the station is built after the CP is granted.

Please contact the undersign if any information is requested to process this application.

Yours truly,



Peter V. Gureckis
President WPVG, Inc.

May 6 9 40 AM '96

FCC MAIL SECT
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

JUN 28 9 35 AM '96

JUN 27 1996

IN REPLY REFER TO:
180082-JBS

DIS
Peter V. Gureckis, President
WPVG, Inc.
10410 Windsor View Drive
Potomac, Maryland 20854

In re: WPVG, Inc.
WPVG, Funkstown, Maryland
BP-960418AA

Dear Mr. Gureckis:

This is in reference to the above-captioned minor change application to relocate the licensed facility site approximately 1.5 miles, and reduce the nighttime power from 250 watts to 240 watts.

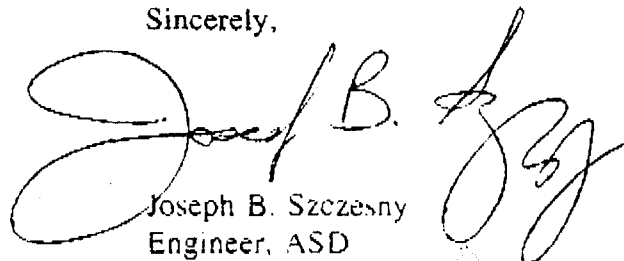
A preliminary review of your application has revealed the deficiencies listed below. A curative amendment must be filed to correct all noted deficiencies before we may complete the engineering review of your application.

1. Page 1 of the engineering statement specified the tower height as 63.64 meters. The actual tower height should be 45.7 meters, based upon the specified 150 foot height.
2. The site plat on Figure 10 does not show the property boundaries, or other obstructions on the site such as roads, as required by question #9, on page 12 of FCC form 301.
3. Please submit the measurement radial graphs and tabulations to be used for your proposal and first adjacent station WHUN, Huntingdon, Pennsylvania. The application did not contain any reference to measurements used for WHUN, and Figure 4 did not contain the protected WHUN contours, as required by the Commission rules.
4. Our Support Services Branch has advised us that they are not in receipt of the Federal Aviation Administration's final airspace determination for the proposed tower. Please submit a copy of the determination if you have received it. If a determination has not yet been released, notify the Commission in writing of this fact and provide the status of any negotiations with the FAA.

Further action on your application will be withheld for thirty (30) days from the date of this letter in order to afford you an opportunity to consider this matter and submit the required information, in proper amendment form, to the Secretary of the Commission. It should be noted that a detailed review was not made of your entire application to determine whether

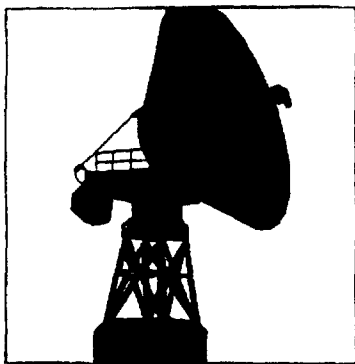
other deficiencies exist which would result in a subsequent dismissal. Please note carefully that all AM stations that have been silent for one year, starting February 9, 1997, will lose their license to operate. In this respect, we request that you amend the application as soon as possible to ensure prompt processing of the amendment. Failure to amend will result in the dismissal of your application.

Sincerely,



Joseph B. Szczesny
Engineer, ASD

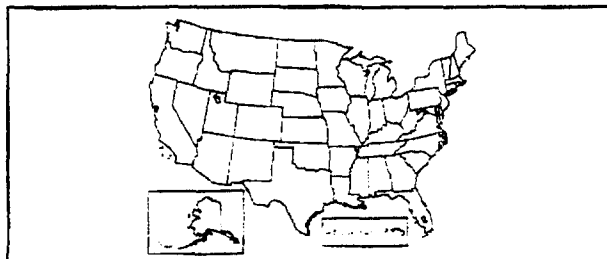
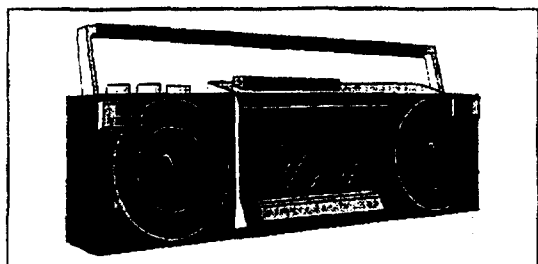
Attachment C



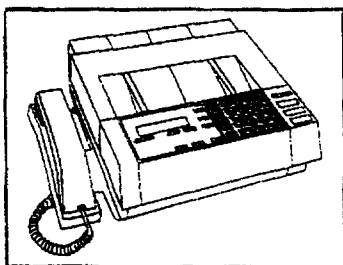
MASS MEDIA BUREAU AUDIO SERVICES DIVISION

1919 M Street, N.W., Washington D.C. 20554

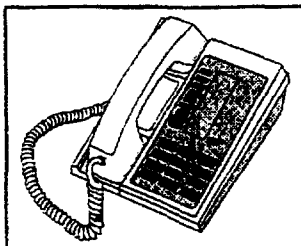
Date: July 30, 1996



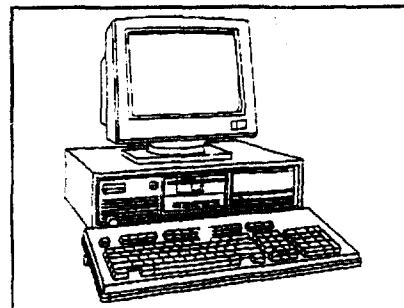
"Serving AM & FM stations
across the United States."



Fax
(202) 418-1410



Phone
(202) 418-2660



Internet
jszczesn@fcc.gov

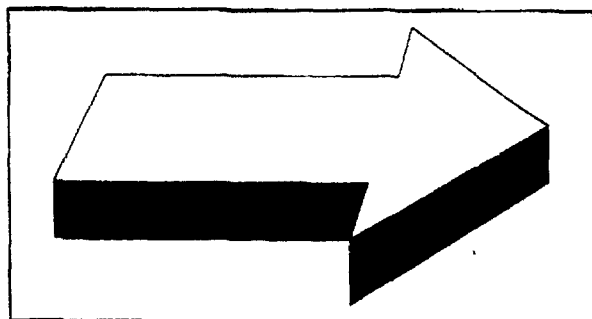
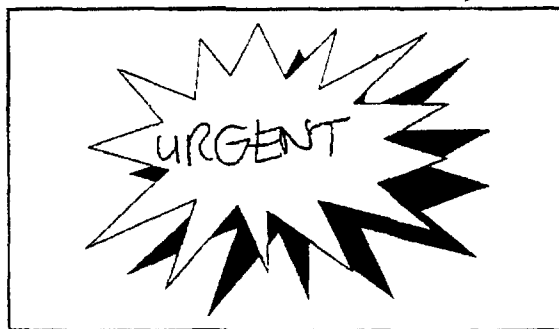
FROM: JOE SZCZESNY, ROOM 342-J

TO: PETER GURCKIS

COMPANY: WPVG, INC.

FAX NUMBER: (301) 299-5604

READY TO GRANT WPVG APP
AS SOON AS FAA APPROVAL
RECEIVED. FAX FAA APPROVAL TO
ME AS SOON AS YOU RECEIVE IT.



THIS SHEET IS PAGE 1 OF 1
PAGES.

SPECIAL INSTRUCTIONS

WARNING: FAILURE TO RESUME BROADCAST
OPERATIONS BY FEB 9, 1997, OR THE 12 MONTH
SILENT PERIOD ENDING THEREAFTER WILL RESULT
IN THE LOSS OF THE LICENSED WPVG FACILITY.
LACK OF FAA APPROVAL WILL NOT DELAY LOSS
OF LICENSED FACILITY DUE TO TELCOM ACT
OF 1996

CERTIFICATE OF SERVICE

I certify that I have, this 14th day of August 1996, caused copies of the foregoing, "Motion for Summary Decision", to be deposited in the U. S. Mail, first class postage paid, addressed as follows:

Alan Aronowitz, Esq.
Federal Communications Commis-
sion
2025 M Street, N. W., Room 8210
Washington, DC 20554

Hon. Arthur I. Steinberg
Federal Communications Commis-
sion
2000 L Street, N. W., Room 229
Washington, DC 20554

Roy F. Perkins, Jr.